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THH RULE OF DAMAGES IN ACTIONS EX DELICTO.

[We take from the June number of the Law Reporter, 1847, at the suggestion of the author, Theodore Sedgwick, a very able article, in reply to one by Professor Greenleaf, on the question whether, in actions of tort, the damages can be any thing more than strictly compensatory. Mr. Sedgwick, in his late work on the Rule of Damages, and in this article, maintains the affirmative. Mr. Greenleaf takes the other side. The question is one of general interest, and this is our reason for republishing the article. Meantime, we take the opportunity of saying that we entirely concur with Mr. Sedgwick, that in actions of tort, vindictive or exemplary damages may be recovered in a proper case. Such has always been the doctrine in Ohio, and we believe in the West generally. In the very last* volume of the Illinois Reports, 2 *Gilman* 432, in the case of *McNamara* v. *King*, we find this doctrine very emphatically asserted. In fact, we have always supposed it to be the English and American doctrine, abundantly settled by authority, though sometimes powerfully assailed on principle. We very recently noticed a decision in the city of New York, making a very proper exception, which serves to prove the rule. The case has, as yet, been only reported in the newspapers; but the point decided was, that where a tort is, at the same time, an indictable offence, (as a libel, or an assault and battery,) only compensatory, and not punitory damages can be recovered; and the reason is, that the law here provides a punishment, distinct from the private grievance. But let Mr. Sedgwick speak for himself, as he is abundantly able to do. Eds.]

The April number of the Law Reporter contains an able and elaborate article by Professor Greenleaf, re-asserting and defending the position originally adopted by Mr. Metcalf, the learned Reporter of the Supreme Court of Massachusetts, in an article in the American Jurist, (vol. iii. p. 387,) that damages even in actions of tort must always be strictly limited to compensation; and this doctrine is also

* This was written before the third volume appeared.

supported by the Journal in the editorial notice of Mr. Sedgwick's work on the Measure of Damages. To endeavor to maintain ground enfiladed by a cross-fire so formidable as this, may seem a rash undertaking; but, disregarding the disparity of strength and numbers, let us address ourselves to the contest—a contest on which we enter with great diffidence as to our own powers, but an unwavering confidence in the strength of our position.

We will first examine the subject on authority, and after ascertaining how it stands in this respect, then look into the matter on principle. But for the purpose of better comprehending the precise nature of the question, let us see exactly what the conflicting propositions are. The doctrine of compensatory damages is thus briefly stated by Professor Greenleaf in his extremely valuable work on Evidence: "The plaintiff is not entitled to receive compensation beyond the *extent of his injury;* nor ought the defendant to pay to the plaintiff more than the plaintiff is entitled to receive." *Greenlf. on Ev. vol. ii. p.* 209.

This latter clause is ambiguous, and in one sense imports a mere truism; for it is very certain that the defendant *never does in fact* pay more than the plaintiff receives, and no more than he is entitled by law to receive. But the meaning of the phrase as amplified and insisted upon in Mr. Greenleaf's recent article, is that the plaintiff's recovery in all cases is limited strictly to *compensation*—not of course to mere compensation for mere pecuniary injury, but "for every circumstance of the act complained of, which injuriously affects the plaintiff, in his person, his peace of mind, his quiet and sense of security in the enjoyment of his rights—in short, his happiness." *Greenlf. on Ev. vol. ii. p.* 219; *Law Reporter for April,* 1847, *p.* 530. The damages must be *compensation*, and nothing more. The counter doctrine is thus stated: "Whenever the elements of fraud, malice, gross negligence, or oppression, mingle in the controversy, the law, instead of adhering to the system, or even the language of compensation, adopts a wholly different rule. It permits the jury to give what it terms punitory, vindictive, or exemplary damages—in other words, blends together the interest of society and the aggrieved individual, and gives damages not *only to recompense the sufferer, but to punish the offender.*" * Of this doctrine, Mr. Greenleaf, in the article already referred to, says that, although it may seem justified by the general language of some Judges, and

* Sedgwick on Damages, p. 39.

by "remarks gratuitously made in delivering judgment on other questions, it is not supported *by any express decision;*" and that "though Judges have spoken of exemplary or vindictive damages, they have never instructed the jury *in terms* that they were at liberty to increase the damages merely for the sake of punishing the defendant, and beyond the amount of injury which the plaintiff had sustained." And it is perhaps worthy of notice, that so completely unauthorized does Mr. Greenleaf seem to consider this doctrine, that it is not alluded to in the chapter in his work on Evidence devoted to the subject of damages, nor would the idea even appear to have occurred to his mind.

We propose in the first place, without further preface, to see how far the above statement of the result of the adjudged cases is correct. The origin of the rule dates back to the time of Lord Camden, and the great controversy about general warrants. In Wilkes' case, that great Judge said: "As to the damages, I continue of the opinion that the jury are not limited by the injury received. Damages are designed not only as a satisfaction to the injured person, but likewise *as a punishment to the guilty*, and as proof of the detestation in which the wrongful act is held by the jury." *Lord Campbell's Chancellors, vol. v. p.* 249. In New York, the doctrine is as old as the case of *Cheetham* v. *Tillotson*, 3 *J. R.* 56. There the charge of the Chief Justice was, that "the case demanded exemplary damages, as well on account of the nature of the offence charged against the plaintiff, as for the protection of his character as a public officer, which he stated as a strong circumstance for the increase of damages, and *that he did not accede to the doctrine that the jury ought not to punish the defendant in a civil suit for the pernicious effect* which a publication of this kind was calculated to produce in society." And to this precise point the defendant's exceptions were addressed. "The charge of the Judge," they say, "was incorrect in stating that the plaintiff was entitled to exemplary damages on account of the injurious tendency of said publication to the country. *In a private action, the party can recover only for the private wrong: he has no concern as to the public offence, for which the defendant must atone by an indictment.*" This, it will be noticed, is precisely the doctrine of Mr. Metcalf and Professor Greenleaf. Now what did the Court say? Kent, C. J., reaffirmed the doctrine of his charge, and Spencer, J., said: "In vindictive actions, such as for libels, defamation, assault and battery, false imprisonment, and a variety of others, it is *always in charge to the jury that they are to inflict damages for ex-*

ample-sake, and by way of punishing the defendant." How is it possible to call this language, as Mr. Greenleaf does, "extra-judicial?" How can it be termed "a remark gratuitously made in delivering judgment on other questions?" In view of this case, can it be safely said that "no jury has ever been told to give damages to punish the defendant?"

So again, in the same State, in a very recent case, *Cook* v. *Ellis*, 6 *Hill* 465, of which Mr. Greenleaf takes no notice, where the defendant, having been punished criminally for assault and battery, it was insisted in an action brought for the same offence, that the fact of the conviction and punishment should be received in evidence to mitigate damages. The discussion, it will be perceived, turns on the very same principle: and what said the Supreme Court in excluding the evidence? "We concede that smart-money, allowed by a jury, and fines imposed at the suits of the people, depend on the same principle. Both are penal, and intended to deter others from the commission of the like crime. The former, however, become incidentally compensatory for damages, and at the same time answer the purpose of punishment." Of this decision the learned author of the article in the Law Reporter takes no notice, and it certainly could not be very well called "a remark gratuitously made in delivering judgment on other questions."

How is it in Pennsylvania? In an action of trespass, *Bride* v. *McLaughlin*, 5 *Watts R.* 375, for selling an execution under circumstances of peculiar injustice and oppression, Grier, President, who is now on the Bench of the Supreme Court of the United States, said, "if the jury believe that the defendants acted in a deceitful, hard, cruel or oppressive manner, they may give not only compensatory, but exemplary and vindictive damages." In error, this was denied to be law, and the counsel for the plaintiff in error cited 3 *Am. Jur.* 287, (the original article of Mr. Metcalf,) in support of the doctrine now insisted on. But the Court said, "whatever be the speculative notions of fanciful writers, the authorities teach that damages may be given in peculiar cases, *not only to compensate, but to punish.* There are offences against morals to which the law has annexed no penalty as public wrongs, and which would pass without reprehension, did not the providence of the Courts permit the *private* remedy to *become an instrument of public correction.*" Is this too "a remark gratuitously made in delivering judgment on other questions?" How stands the law in the Pennsylvania Circuit? In *Conard* v. *Pacific Ins. Co.*, 6 *Peters* 272, Mr. Justice Baldwin said:

"When a trespass is committed in a wanton, rude, and aggravated manner, indicating malice, or a desire to injure, a jury ought to be liberal in compensating the party injured in all he has lost in property, in expenses for the restoration of his rights, in feeling, in reputation; and even this may be exceeded *by setting a public example*, to prevent a repetition of the act." How clearly is the distinction here taken, and the rule for which we contend insisted on.

In New Hampshire the whole subject has been repeatedly considered. In trespass *de bonis asportatis* for a sleigh and horse, the defendant denied that he had committed any tort, and rested his argument upon his innocence of intention, and upon the existence of bailment at the time he removed the property. Woodbury, J., said: "In respect to the intention, that is not, in cases of this sort, a subject of inquiry, *except to prevent vindictive damages*. In crimes, the intention is the essence of the charge; but in civil actions, the injury caused to the plaintiff is the essence of the charge, and whether committed through ignorance or malice, it is neither more nor less an injury caused to the plaintiff by the defendant. The intent of the party may affect the damages; and as the defendant appears not to have been actuated by any bad motive, nor to have sold or converted the sleigh to his own use, he should pay only *the actual injury* caused by the removal of the sleigh." *Sinclair* v. *Tarbox*, 2 *N. H. R.* 135. This recognizes the precise doctrine, that in civil cases, proper for vindictive damages, the amount of recovery varies with the intent of the defendant, and does not depend on the mere question of injury sustained. In an action for criminal conversation with the plaintiff's wife, the Judge told the jury, that "in estimating the damages, they should look, not only to the character and conduct of the plaintiff and his wife, to see that such a husband ought to recover for criminal conversation with such a wife, but to the conduct of the defendant, in order to determine what a person, who had conducted as he had, *ought to pay*—thus disregarding utterly and distinctly the notion, that "the defendant should not pay more than the plaintiff ought to receive." To this charge the defendant excepted, on the ground that "it directed the jury that the damages might be imposed by the jury as a punishment," insisting that, "however reasonable it may be that the defendant should be punished for his misconduct when prosecuted by the State, the plaintiff had no claim to profit by his degradation." But of this opinion was *not* the Court, saying, "after an attentive examination of the subject, we see nothing in the instructions given to the jury in rela-

tion to the damages, which we think ought to have been otherwise." *Sanborn* v. *Neelson*, 4 *N. H. R.* 501. Is this "*gratis dictum*," "extra-judicial," or is it a "remark gratuitously made in delivering judgment in other cases?"

In a case in the same State, to recover damages for the loss of a horse, arising from defects in a bridge, which the defendants were bound to repair, the Court instructed the jury, that for ordinary neglect the plaintiff could not recover exemplary damages; but that such damages might be allowed in the discretion of the jury, in case they believe there had been gross negligence on the part of the defendants. In the report of the motion for a new trial, the arguments of counsel are not given, but the Court cited *Woert* v. *Jenkins*, 14 *J. R.* 352, *Tillotson* v. *Cheetham*, 3 *J. R.* 57, *Huckle* v. *Money*, 2 *Wils.* 205, 3 *Wils.* 10, concurred with the decisions in those cases, and said "the principle is thus established, that in actions for tort to the person and to personal property, the jury may give *liberal or exemplary damages in their discretion—damages beyond the actual injury sustained*, for the sake of example; and the only remaining inquiry is, whether this case was proper for the exercise of that discretion." *Whipple* v. *Walpole*, 10 *N. H. R.* 130. Is this too a remark gratuitously made?

In Connecticut, it is certainly true, that in saying that "no principle is better established, and in practice more universal, than that vindictive damages, or smart-money, may be awarded by the verdict of juries," as the Supreme Court did in the cases of *Linsley* v. *Bushnell*, 15 *Conn.* 225, *Huntley* v. *Brown*, 15 *Conn.* 267, this language was not absolutely necessary for the case before them; but it is equally true, that before pronouncing this language, they had, as will appear by the report, examined the cases on which the doctrine of vindictive damages rests, and that they adopted the principle of those decisions. We suppose that if the inquiry were pursued, similar adjudications might be found in almost every State of the Union. Thus, in Illinois, in an action to recover damages for seduction of a daughter, it was insisted that the father could only recover the damages sustained by loss of service and expenses; but it was held that the jury might award him compensation for the dishonor and disgrace cast upon him and his family, and for the being deprived of the society and comfort of his daughter, the Court saying, "in vindictive actions, and this is now regarded as one, the jury are always permitted to give damages for the double purpose of *setting an example, and punishing the wrong-doer*." *Grabe* v. *Margrave*, 3 *Scam.*

373. So again, in the same State, in an action of trover brought for a horse, it appeared that the defendant, being bailee of the animal to be agisted and fed, used the horse for his own purposes without leave. The horse died a few hours after the unauthorized use, but not in consequence of the using. It was held by the Supreme Court, in error, that there being no proof of actual damage, they would not set aside a verdict which had been rendered for the defendant. Application being made for a new trial, they refused it, saying, that "as the value of the horse was not sought by the proof, the only damages that could be recovered would be in the nature of smart-money, for the wrongful use, which must be in their nature vindictive, as there is no proof of special damages or injury. And it is a rule that Courts will not grant new trials where vindictive damages only are sought to be recovered, or merely nominal damages." *Johnson* v. *Weedman*, 4 *Scam.* 495. Now it is perfectly true, that in this as in some of the other cases, the present question was not necessary to be decided, but at the same time it was equally clear that the Court had considered it, and had made up its mind on it.

We confess ourselves utterly at a loss how, in the face of these decisions, the very learned and acute author of the work on Evidence can say that the rule of vindictive damages, for the purpose of punishment, is not supported by any express decision. We suppose, on the contrary, that in the four States of New York, New Hampshire, Connecticut, and Pennsylvania, the point is so conclusively settled, as not to admit of argument. We venture to assert, in New York at least, that this is strictly so. Independent of these decisions, the whole current of authority, and the very nomenclature of the law, require the doctrine for which we contend. What do the Supreme Court of the United States mean in the case of *Tracy* v. *Swartwout*, 10 *Pet.* 81, by laying stress on the difference between compensatory and exemplary damages? Surely words mean something. *Compensatory* damages must be for compensation. *Exemplary* damages are something different. What are they? The new doctrine requires a radical change in the terminology of the law. The learned author of the work on Evidence denies assent to any but decisions expressly on the point, and treats all other as extra-judicial, *gratis dicta*, or as "gratuitous remarks made in delivering judgment on other questions." It is admitted, in the article in this journal above cited, that the doctrine of vindictive damages has been recognized by several eminent Judges, but

their opinions are called "gratuitous," "extra-judicial," "passing allusions," &c. We beg leave to ask whether the contrary doctrine can find even a "gratuitous, extra-judicial, or passing remark" from the bench in its favor. We know it is constantly said, in general, that damages are intended for compensation—very loose language, at the best, for no verdict ever compensated for the entire injury; but has it ever been decided or suggested, by any Judge of any Court, that a jury cannot, in actions *ex delicto*, give damages by way of punishment beyond the line of compensation?

As to the principle of the matter, the learned author of the work on Evidence, and the Editor of the Law Reporter, seem both to be of opinion, that there is, and can be a clear, complete line of division drawn between the public and private interest; indictments being provided for the body social, and suits for the individual. To our minds this division seems entirely fanciful and imaginary. How is it possible so to divide the community and the individual? In organizing civil Courts of Justice, how much does the legislator take into regard the fact, that social order depends on controversies being adjusted by the public authorities. In *qui tam* actions, how clearly are the public and private interests blended; in all cases of misdemeanors, how manifestly is the party offending subjected to a double pecuniary punishment, first by verdict, and next by fine. What difference does it make, whether the verdict is for compensatory or vindictive damages? If the verdict is for compensation, and the party injured is completely compensated, what remains of public offence? We apprehend that the suit, in cases which are also punishable by indictment, is a mere cumulative remedy. Surely there is nothing contrary to principle in this view of the case. But there is a very numerous class of cases of reckless negligence and gross fraud, not amounting to criminal offences, and in which, if the plaintiff is to be limited to compensation, no punishment, as such, can ever be inflicted. Is this desirable for purposes of social order? Does the cold doctrine of compensation, in cases of this description, satisfy the *heart* of jurisprudence?

The most serious difficulty, h wever, occurs in the practical application of Mr. Greenleaf's rule. How is the party to arrive at the measure of compensation? How is a jury to get at remuneration for loss of honor, loss of credit, wounded feelings, injured sensibilities? If it is difficult to minister to a mind diseased, who is to compensate a mind exasperated? What is the rule? What is the standard? Would not a jury, solemnly charged in an action of

trespass, that they must limit the damages to compensation,—that they must give not a cent more, not a farthing less,—that it must be the pound of flesh and not a drop of blood—would they not be utterly lost in a metaphysical maze? How are feelings, character, social position, to be estimated in dollars and cents? The old puzzle—"if a pair of andirons cost a dollar, how much will a load of wood come to?" is a practical and intelligible proposition, compared to measuring mental injury by the standard of strict pecuniary compensation. Again, suppose the doctrine established that the jury are to confine themselves to compensation, how is it to be *enforced?* Necessarily by the Court. But this certainly cannot be done: on the contrary, the authorities are clear, and the learned author of the work on Evidence, in the article in this journal already cited, admits that the Court have no power over the subject, unless the damages are so gross as to raise a suspicion of partiality or passion. So says Mr. Justice Story, refusing to set aside a verdict in an action of this class: "The damages are certainly higher than what, had I been on the jury, I should have been disposed to give: I should now be better satisfied if the amount had been less." *Thurston* v. *Martin*, 5 *Mason* 497. See also *Duberley* v. *Gunning*, 4 *T. R.* 651, and a number of similar cases.

So that in adopting the rule of Mr. Greenleaf, we come to these practical conclusions: *First*, the jury are told that they are to give compensation, and nothing further; *secondly*, they are left without any standard whatever to measure the compensation; and *thirdly*, even if they go beyond the line of compensation, the Court has no authority to interfere. The rule is without practical applicability, and without any binding efficacy. We confess that, rather than rush into such contradictions, we prefer to take the law as we believe that we find it adjudicated in England, and in four of the most respectable States in the Union. As to "scraping off barnacles," by which poetical figure we are invited, by a learned critic in this journal, to disregard the positive language of the law, we suppose it would hardly add to the value of an lementary treatise, if, disregarding the express decisions of Cour ıt were to adopt a new rule, unsupported by any adjudged case, and environed by so many difficulties.

As to damages being compensation, the sooner the idea is got out of the head of a practical lawyer the better. Damages are, in no

just sense, compensation. In the most ordinary case of a suit on a note of hand, the damages do not amount to compensation. Who pays the counsel fees? Who pays for the time of the plaintiff? Who pays for his annoyance and vexation? The most successful lawsuit is too often a Barmecide feast.

CIRCUIT COURT OF COLES COUNTY, ILLINOIS: OCTOBER TERM, 1847.

IN THE MATTER OF JANE, A WOMAN OF COLOR.

ON HABEAS CORPUS.

A citizen of Kentucky brought certain slaves into Illinois, where he had a farm, spending about half of his time in each State. His slaves were carried back and forth, occasionally changing them. In 1845 he brought a negro woman and ten children to Illinois. They were retained there as slaves, when they sued out a writ of *habeas corpus* to test their right to freedom: *Held*, that bringing the slaves into Illinois, and holding them there, was in contravention of the Constitution of the State, and that all title to the services of the woman and her children was thereby forfeited.

Where a person voluntarily lomiciled his slaves in a free State for two years, although he professed his intention of leaving them there but temporarily, it was held that he had forfeited all claim to their services.

JANE, a woman of color, and her four children, were brought before the Hon. William Wilson, Chief Justice, and the Hon. Samuel H. Treat, Associate Justice of the Supreme Court of Illinois, on a writ of *habeas corpus*, to be released from imprisonment as runaway slaves, claiming their freedom. They were claimed by Gen. Robt. Mateson, of Bourbon county, Kentucky, as his slaves.

The material facts are stated in the Opinion.

O. B. FICKLIN and C. M. CONSTABLE, for the woman and children; U. F. LINDER and A. LINCOLN, for Gen. Mateson.

Chief Justice Wilson delivered the following written Opinion:

It is admitted by counsel that Jane and her children were the slaves of Gen. Mateson, in the State of Kentucky, and that he brought them to Illinois. The question submitted to the Court is, whether, under the circumstances of the case, Jane and her children have acquired their freedom, or whether they still owe their services to Mateson, and are liable to be removed out of the State by him.

The depositions read in evidence contain much irrelevant matter, but they and the oral testimony adduced, establish the following

facts, viz.: that in 1836, Gen. Mateson was a citizen of Kentucky, and the owner of a farm and twenty odd negroes; that the same year he came to Illinois, purchased a tract of land, and made a farm, which he has ever since continued to cultivate; about half his time has been spent here, since he first came to this State, but has always claimed to be a citizen of Kentucky, and was, on one occasion, a candidate for the State Senate for Bourbon county, in said State, and always voted there, except on two occasions, when in 1840 and 1844 he voted for President and Vice President in the State of Illinois. Several times he brought some of his negroes from Kentucky here, and after having kept them upon his farm a few months, took them back to Kentucky, and replaced them with others. In 1845 he brought Jane and her children to this State. Since then she has lived upon his farm in the capacity of housekeeper. Mateson constantly expressed the intention of keeping his negroes here but a short time—said that he only stopped them here until he could get ready to remove them to a farm in the western part of Kentucky. It is but just to Gen. Mateson to say, that all the testimony shows him to be an extremely kind and indulgent master, and that he showed every disposition to submit to the result of an adjudication upon his claim. These are substantially the facts of the case.

It was argued with unusual ability by the counsel on both sides, and I regret that the press of business will not allow me to present the positions assumed and the arguments in their support.

The abstract question of slavery affords a wide field for discussion, but it is one which does not arise in this case, nor are we called upon to express an opinion, either upon its morality or policy. It has unfortunately existed from the earliest period of which we have any account, and even the philanthropic spirit of the present age, which sets strongly against it in one form, is often found tolerant of it in another. For it cannot be disguised, that the loudest cries for emancipation, and the fiercest denunciations against the slaveholder, are heard from the people of that nation, whose cupidity first planted slavery upon our shores, in defiance of the prayers and protests of the colonies, and who now hold a tenth of the human race in a state of bondage as onerous as that of the African.

Slavery is unquestionably to be deplored as a great evil in any form, and by none more than those who find it so interwoven with their political institutions, that any rash and injudicious attempt to remove it might endanger the whole structure. The removal of this deforming feature from our fair and happy form of government, would leave it

almost without a blemish; but until means can be devised by which that can be done with safety and justice to all parties, it is the duty of every good citizen to conform to the Constitution and the laws of the United States, as they exist; and the Courts, by carrying them into effect, in the spirit in which they were adopted, will show a due respect to the institutions of our sister States, and at the same time vindicate those of our own.

According to the principles of the common law, and also of the law of nations, no obligation is imposed upon a sovereignty, or the citizens of one State to restore a fugitive escaping to it from the jurisdiction of another. The law of slavery is a municipal regulation, and local in its operation: agreeably, therefore, to the principle of national and common law, the rights of the master cease, and the slave becomes free, the moment he passes without the jurisdiction that recognizes the relation of master and slave. Convenience and policy, however, have frequently induced States to modify this principle of national law, in relation to fugitives owing service, or charged with crimes, etc., escaping from one jurisdiction into that of another, and by treaty stipulations have granted a reciprocal right of the recaption of fugitives, in the cases and in the modes prescribed. At the period of the adoption of the Constitution of the United States, slavery existed in most of the States of the confederacy, and as they bore the same relation to each other, and recognized the same general law that was applicable to other independent States or nations upon the subject of slavery, and the right of reclaiming fugitive slaves, it did not escape the prescience of the Convention, that this subject would be likely to give rise to irritation and angry excitement between the citizens of proximate free and slave States: hence the adoption of the second section of the fourth article of the Constitution of the United States, which was intended to obviate dissimilar and conflicting legislation upon this subject by the States, to promote harmony among them, and secure the recognized rights of individuals in accordance with a uniform rule.

The subject of slavery was the most embarrassing one with which the Convention had to deal; and it was only by their devotion to the cause in which they were engaged, and the exercise of a generous and magnanimous spirit of concession and compromise, that they were able to overcome the difficulties by which they were surrounded.

The Constitution of the State of Illinois declares, that "there shall

be neither slavery nor involuntary servitude," etc., within the State. The act, therefore, of bringing Jane and her children into this State, and holding them here, being in contravention of this provision, would of itself work a forfeiture of the title of Mateson, unless some saving clause can be found in the paramount law of the Constitution of the United States by which it would be perpetuated.

The right of reception under the second section of the fourth article of the Constitution of the United States, is confined to persons held to service or labor in one State, under the laws thereof, *escaping* into another. The language of the act of Congress of the 12th of February, 1793, is, that "where any person held to labor in any of the United States, under the laws thereof, shall *escape* into any other of the said States," etc., the owner or his agent may seize such *fugitive* from labor, and upon proof made to the satisfaction of the Judge, that the person so seized doth, under the laws of the State from which he *fled*, owe service, etc., it becomes the duty of the Judge to grant the certificate.

This Constitutional provision, and the law in aid of it, define the rights of the master, and prescribe the only course by which he can reclaim a slave who has fled from his service into a State or Territory in which slavery is not recognized. So far as relates to this case, repeated decisions have given a uniform construction to these laws. The master is entitled to the re-delivery of his servant only when the servant escaping has been legally held to service in one State, and has escaped into another. He must be a fugitive from the service of his master. In the case of *ex parte* Simmons, the Court said, "the Constitution and laws relative to this subject are susceptible of no broader construction than the language, and do not embrace persons owing service, brought and carried into another State."

From this view of the subject, it is manifest that Mateson has forfeited all title to the services of Jane and her children. There can be no pretence that she is a fugitive from his service in Kentucky. Indeed, it is not controverted that it was by his direct and voluntary act that she was brought here in 1845, and kept within his employ up to within the last few days.

Considerable importance is attached by counsel to the fact that Mateson retained his citizenship in Kentucky, and professed the intention of leaving his servants in Illinois but temporarily. But we cannot perceive that these circumstances are entitled to the consideration in this case claimed for them. Neither the place of residence,

nor the declared intentions of Mateson, countervail the fact that he voluntarily domiciled his servants here for two years or upwards. Even if, from some contingency, they had remained but a day, the circumstance of his having transferred their domicil from Kentucky, and fixed it in Illinois, would have produced the same result.

There have been repeated adjudications upon the Act of Congress of 1793, and although there are some discrepancies between those of different States, upon some points, yet they all concur in every point arising in this case, and agreeably to the interpretation thus given to the Act of 1793. In connection with the Constitution of Illinois, we are clearly of opinion that Mateson, by bringing Jane and her children into the State of Illinois, and domiciling them here, has forfeited all claim to their services, and entitled them to be discharged therefrom.

The case of *Vaughn* v. *Williams*, decided by Judge McLean, and *ex parte* Simmons, are directly in point. Jane and her four children are ordered to be discharged by the Court.

CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OHIO: NOVEMBER TERM, 1847.

Driskell *v.* Parish.

FUGITIVE SLAVES—HARBORING—OBSTRUCTING CLAIMANT.

[The following condensed report of this case, was prepared for the Cincinnati Gazette, by one of the learned counsel, and may be relied upon as accurate. Eds.]

The action was brought by Peter Driskell, of Mason county, Kentucky, against Francis D. Parish, a highly respectable lawyer of Sandusky, in this State, to recover several penalties, under the act of Congress, of February 12th, 1793, for harboring certain alleged slaves of the plaintiff, and obstructing their arrest.

The testimony was conflicting. For the plaintiff, two men, Mitchell and Driskell, the latter a son of the plaintiff, testified that in October, 1844, a woman and her five children, slaves of the plaintiff, escaped from his service in Kentucky, and that the witnesses were despatched in pursuit; that on the 28th of February, 1845, they arrested two of the boys in Sandusky, and then called at the house of Mr. Parish,

with whom they had learned that the woman and her youngest boy, a lad of four years old, were living; that an interview took place in front of the house, between them and Mr. Parish and the woman and little boy; that the woman and boy attempted to approach them, but were prevented by Parish; that Mitchell told Parish he had a warrant of attorney to take them; but Parish replied that it would not do—he must have judicial authority; that Mitchell then demanded the privilege of arresting them there, but Parish refused it, and directed or waived the servants into the house, and shut the door. This was the statement of Mitchell. Driskell concurred, except that the said Mitchell attempted to enter the gate to arrest the servants, whereupon Parish pushed them into the house. Mitchell said he had made no statement or admissions variant from this at the Court-House in Sandusky, where he was examined on a charge of riot committed in arresting the two boys, nor at any other time.

On the other hand, Judge Sadler, the President Judge of the 13th Circuit, Justice Barker, the examining Magistrate, Mr. Beecher, the lawyer for the prosecution on the riot charge, Col. Sloan, the lawyer who defended Mitchell on that charge, and Messrs. Barber and Mackay, two respectable citizens, all concurred in testifying, that on the 1st of March, 1845, the day after the transaction at Parish's gate, during the examination of Mitchell and Driskell on the charge for riot, Parish was called to the stand as a witness for the defendants, and was called upon to state the circumstances which transpired in front of his house, and did, accordingly, make a full statement, to which, after being corrected in some trifling particulars, Mitchell gave his full assent, and repeated, himself, the entire statement. In this statement, there was no pretence, on the part of Mitchell, that Parish made any demand of judicial authority, or interfered in any way to prevent either of the servants from approaching Mitchell and Driskell; or that Mitchell made any attempt to arrest them; or that Parish refused to permit such arrest, or directed or pushed the servants into the house. On the contrary, both Mitchell and Parish then agreed in saying, that when Mitchell stated he had come for the slaves, Parish said he should see that they had a fair trial, but would oppose no obstruction to the execution of the law, and they separated, after some conversation as to the Justice of the Peace before whom the trial of the claim to the servants should take place.

Miss Dastin, a witness for the defendant, who was present at the

interview between Mitchell and Parish, also testified that there was no demand for arrest, no pushing of the servants into the house, no attempt by Mitchell to seize, and no prevention of seizure by Parish.

The Court charged the jury at length, recapitulating fully all the evidence, with great ability. The leading points of the charge are these:

The act under which the suit was brought has been held to be constitutional; but it is a penal statute, and must be construed strictly.

Harboring and concealing, in the acts are synonymous, and to make out a case of harboring there must be proof of concealment, with intent to defeat the claims of the master.

Obstruction and hindrance, under the act, are also synonymous; and to make out a case of obstruction, there must be proof of an attempt to seize, and an interposition by the defendant in a way calculated and intended to prevent the seizure.

To see that persons claimed as fugitives from justice have fair trials, and to insist upon their having such trials, is laudable, but these must be in good faith towards the claimant.

The same act of harboring or obstruction can subject the party charged to but one penalty, whatever may be the number of the alleged fugitives, subjects of the act; and so the same act cannot constitute both harboring and obstruction, so as to subject the actor to two penalties. To subject the defendant in the present case, there must be proof of separate acts of harboring and obstruction.

In the present case, the plaintiff must make out his right to recover by strict proof; but if this proof is furnished, he is entitled to a verdict.

The jury, after being out seven hours, found a verdict for the plaintiff on the two counts in the declaration, which charged the defendant with harboring Jane Garrison, and obstructing her arrest, and for the defendant on the other two counts, which charged the harboring and obstruction to the arrest of her son.

A motion for new trial was made and argued, but we are not advised what disposition has been made of it.

Messrs. Henry Stanbery and J. H. Thompson appeared for the plaintiff; Messrs. S. P. Chase and J. W. Andrews for the defendant.

CHANCELLOR KENT.

Died, at New York, on the 12th of December, 1847, James Kent, in the eighty-fifth year of his age.

After the death of Judge Story, no one hesitated to speak of Chancellor Kent as the most learned living American jurist. And now that he too is dead, there is a void left, which it will take years, if not generations, to fill, in the estimation of the American Bar. But it is not for us to write his eulogy. This will be done by abler pens, and we may avail ourselves of their labors. In the mean time we compile from sources within our reach, and chiefly from the New York Tribune, the following biographical sketch of this great jurist and good man.

James Kent was born on the 31st of July, 1763, in Fredericksburg, then a part of Dutchess, but now of Putnam county, New York, and was the eldest son of Moss Kent, a graduate of Yale College, Connecticut, who was admitted to the bar of Dutchess county in 1756. His grandfather, Rev. Elisha Kent, a native of Suffield, Connecticut, was for thirty-six years minister of the Presbyterian Congregation of Kent's Parish in Dutchess county, and his brother, Moss, sat in the Senate of this State, and in Congress, and was for some time Register of the Court of Chancery.

Mr. Kent was sen to school at Norwalk when but five years old, and was placed under various instructors until he entered Yale College in September, 1777, more than 70 years since. From the precepts, and yet more the example, of those pious puritans, among whom his early years were passed, he acquired that simplicity of character and purity of morals which he preserved through life.

In July, 1779, New Haven was invaded by the British forces, the College broken up, and the students dispersed. In his exile, young Kent met with Blackstone's Commentaries, read and admired them, and at sixteen determined to be a lawyer. He finally left College with high reputation, studied law with Egbert Benson, Attorney General of New York, was studious, temperate, and a water-drinker, indulging in none of the fashionable pleasures or dissipation of the times. An enthusiastic admirer of nature's charms, the love of reading was his ruling passion. He was cheerful, lively, and communicative; young, ardent, active, and persevering. His mind was early

stored with useful knowledge; and the morning of his life gave promise of the noonday brilliancy of his remarkable career.

In April, 1787, he was admitted, at Albany, a Counsellor of the Supreme Court—in 1790, and again in 1792, elected to the Legislature by the people of his native county. From the purest motives, and believing its policy the best for his country, he joined the Federal party, became the steadfast friend of Jay, Hamilton, and thers of its leaders, to whose political principles and usages he steadily adhered, until, in 1819, it ceased to exist.

After failing to be elected to Congress by a few votes, he removed, in 1793, from Poughkeepsie to this city—was appointed Professor of Law in Columbia College, and delivered a course of Lectures the year following. In 1796 he was appointed a Master in Chancery —there were then but two of them—and next year called to fill the office of Recorder of New York. In 1798 he ascended the Supreme Court Bench as one of the Judges, and removed his residence to Albany, where he commenced the practice of delivering a written, argumentative Opinion, supported by legal authorities, in every case of sufficient importance to become a precedent for the future. Thus commenced that series of recorded judicial decisions which have enriched the jurisprudence of New York, and proved alike useful to the legislator, the Judge, and the codifier.

Judges Kent and Radcliffe revised the Statutes of the State in 1800. In July, 1804, the former was appointed Chief Justice of the State, and continued to preside in the Supreme Court until his appointment as Chancellor in February, 1814. His legal Opinions, delivered while in the Supreme Court, are contained in sixteen volumes of well known and highly appreciated Reports.

As Chancellor, which high office he filled till 1823, he is understood to have displayed to great advantage those excellent business habits, and that promptitude which marked his career through a long and invaluable life. A few favored lawyers had, before his time, monopolized Chancery business—he threw its doors wide open to the profession—and was unwearied in his efforts to despatch the causes brought under his cognizance.

By the Constitution of 1821, the Judges were removable from office at 60 years of age; and, on July 31, 1823, he, having reached that period, retired, after hearing and carefully deciding every case which had been brought before him. The members of the bar in this city and Albany took that occasion to bear ample testimony to his worth and usefulness, and to acknowledge the benefits which soci-

ety had derived from his learning, wisdom, and assiduity. In 1824 he became a second time Law Professor in Columbia College, and in 1826 appeared the first volume of his inestimable "Commentaries on American Law," which were concluded in four volumes in 1830, and have been extended and improved by him, with great care, from that period to this.

Chancellor Kent would not allow his Commentaries to be stereotyped, but kept watching the decisions of the tribunals of America, England, and other parts of Europe, in matters involving important legal principles, with which he enriched his favorite work from time to time.

He was elected President of the New York Historical Society in 1828, and was an original member of the Literary Association of Yale College, formed in 1780, under the name of the Phi Beta Kappa Society. In 1821 he represented Albany county in the State Constitutional Convention, Ambrose Spencer, now on his death-bed, being his colleague. He was a distinguished ornament of that learned and patriotic body, and steadily adhered to the opinion, that with a constituency of freeholders, owners and cultivators of the soil, the unincumbered possessors of happy homesteads, the liberties of the country would be safest. In 1785, he married a sister of Gen. Theodorus Bailey, a lady now nearly 80 years old, and who survives him, after enjoying over three score years of uninterrupted domestic felicity. His family consisted of two daughters and one son, the learned and well known Judge Kent, who resigned the office of Circuit Judge some years since, and more recently gave up his Professorship at Cambridge, that he might cheer the latter days of his venerated and excellent father, by his company and personal attentions.

Less than a year ago, Chancellor Kent was one of the pall-bearers of his friend Timothy Dwight, and was then as erect, hale and active as a man of fifty. At 84, he was somewhat deaf, but his capacity for work was still wonderful, his conversation interesting and animated, and his temperament as vivacious as when he was thirty years younger.

He was an exemplary Christian, a steadfast friend, an affectionate father, a tender husband, an ardent patriot, and a true lover and defender of his country's rights. So highly are his works esteemed abroad, that the Lord Chief Justice of England, Baron Denman, wrote to Judge Kent, some years since, to acknowledge the in-

debtedness of the legal profession throughout the world to him for his able Commentaries.

His health had been failing, by slow degrees, for some months; and he was daily waiting for his departure. He expired, we are told, without suffering, and in the perfect possession of his faculties to the last. Up to within a few days of his death, he was occupied in correcting the proof sheets of one of his works, an edition of which was passing through the press.

COURT OF COMMON PLEAS OF LICKING COUNTY, OHIO: OCTOBER TERM, 1841.

Seth Williams *v.* Asa Guerney.

[Reported by G. B. Smythe.]

A judgment rendered in any of the United States, pursuant to the law thereof, although personal service was not made on the defendant, has the same effect in every other State, as it had in the State where it was rendered.

This was an action of debt. The declaration counted, in the usual form, on a judgment rendered by the Court of Common Pleas, of the county of Hampshire, Massachusetts, in August, 1838, against Asa Guerney and others as partners. Service in the present case was made on Guerney only.

The defendant, after craving oyer of the transcript, (of which profert was made,) pleaded, that "at the time of the suing out of the original writ, in said supposed recovery, and continually since, he was not a resident or inhabitant of the Commonwealth of Massachusetts, nor within the jurisdiction thereof; nor was he served with any process thereon; nor did he appear thereto in person, or by attorney; but the said supposed recovery was had without any notice to him or attachment of his property."

By inspection of the record, the following entries appeared, which, with the writ and return referred to, were the only process against the present defendant, viz.:

"And it now appearing to the Court here, upon the suggestion of the plaintiff's attorney, and the examination of the writ in this case, that said writ was served upon the said Asa Guerney and Darius

Ford, two of the defendants named therein, by leaving a summons at the last usual place of abode of each of them within said county, and it further appearing that at the time of the service of the writ aforesaid, the said Asa and Darius were not inhabitants of or residents within this Commonwealth, it is therefore ordered by the Court that the plaintiff cause an attested copy of this order to be published three weeks successively in the Northampton Courier, a newspaper," &c., "the last publication to be twenty days at least before the term of this Court next to be holden," &c.; "that the said Asa and Darius, two of the defendants named in said writ, may have notice of the pendency of this action, and then and there appear, if they see cause, and answer thereto."

Here follows a certificate of the attorney and clerk, that the publication had been made pursuant to the order. Judgment was at the next term rendered against Guerney and Ford by default.

The plaintiff replied to the foregoing plea in substance, that the defendant, before the suing out of the said original writ, had been an inhabitant of Massachusetts; that the said writ was served, and the order and publication of it were made as in the record recited; which being done, "it was legally competent for said Court, according to the laws and usages of the Commonwealth of Massachusetts," to proceed to judgment against this defendant; that by the same laws and usages, the defendant, Guerney, was entitled as of right to a review of said judgment, within one year after the rendition thereof; and if this was not done, he was, at any time within one year after he had notice of the judgment, and not after, entitled to apply to the Supreme Court of Massachusetts for a review of the same. The replication then averred, that on the 1st day of September, 1838, the defendant had notice of the judgment, and did not within one year thereafter, as of right or otherwise, demand a review thereof: wherefore, by the laws and usages of Massachusetts, the judgment became, and was final and unimpeachable in its effect, and that the faith and credit thereof in that State was that of a debt of record. To this replication there was a general demurrer and joinder.

Mathiot & White and H. Stanbery, for defendant, in support of the demurrer, cited numerous authorities from the Reports of Massachusetts, New York, and Ohio, in reference to the effect of judgments of the sister States, and contended that all such were of no effect in other States, unless a personal service had been effected upon the defendant. They further contended that no legislative act of one State could affect the rights of a citizen another in a

personal action, unless such person had been served with process in the proper jurisdiction.

G. B. Smythe and Hunter, for the plaintiffs, produced and read from the Revised Statutes of Massachusetts, (pages 552 and 565,) certain statutory provisions to the effect set forth in the replication. They cited the Constitution of the United States—that "full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State," and that Congress should by law prescribe the "effect thereof;" also the Act of Congress, approved May 26, 1790, by which it is provided that the "records and judicial proceedings" of each State "shall have such faith and credit given to them in every Court within the United States, as they have by law or usage in the Courts of the State from whence the said records are or shall be taken." Also, the Opinion of the Court in *Mills* v. *Duryee*, 7 *Cranch* 481, that "if in such Court," (the Court from which the record is taken,) "the judgment has the faith and credit of evidence of the highest nature, namely, record evidence, it must have the same faith and credit in every other Court. Congress have declared the *effect* of the record, by declaring that faith and credit shall be given to it. It remains then only to inquire in every case, what is the effect of a judgment in the State where it is rendered." Also *Hampton* v. *McCormick*, 3 *Wheat.* 234, namely: "A judgment of a State Court has the same credit, validity and effect in every other Court within the United States, which it had in the State where it was rendered; and whatever pleas would be good to a suit brought in such a State, and *none others*, can be pleaded in any other Court within the United States." They also quoted 13 *Pet. R.* 312, and 4 *Wash. C. C. R.* 17.

It was therefore claimed that the effect of this judgment in Massachusetts, being that of a conclusive record against the defendant, the same effect obtained here, and the judgment could not now be impeached.

Searle, P. J., after full argument, overruled the demurrer, and directed judgment to be entered for the plaintiff; holding, that under the law of Congress and the Constitution of the United States, the defendant was concluded by the laws of Massachusetts.

DECISIONS OF THE SUPREME COURT OF OHIO, SITTING IN BANK, AT COLUMBUS: DECEMBER TERM, 1847.

[It has been our practice heretofore to publish all the decisions of the Court in Bank, in the order in which they were made; and we do the same this year, because we learn that many of our subscribers expect it. But hereafter it is our intention to publish selections only, arranged alphabetically under appropriate heads, as in other cases. We copy from the reports furnished for the Ohio State Journal, by Henry Griswold, Esq., official Reporter. EDS.]

Keen v. *Mould.* Demurrer to plea. Avery, J., held,

1. That the Bankrupt law of the United States was constitutional, and that a plea of certificate of discharge under said act pleaded since last continuance, is a bar to the further prosecution of the suit.

2. That it is not necessary to state in such plea the time when the plea is filed; that such time appears sufficiently from the filing, and leave of Court to file it. *Demurrer overruled—Judgment for Defendant.*

Kemp and Backey v. *Walker et al.* Chancery. Hitchcock, J., held,

That the delivery of a mortgage to the mortgagee, after the same has been recorded, is a sufficient delivery.

Follett v. *Hall et al.* Bill of Review. Read, J., held,

That a mortgage handed in for record on the first day of the term of Court, but before the Court actually convenes, will prevail against a judgment lien recovered at the same term. *Decree reversed—cause remanded to county.*

In this case Birchard, C. J., dissented, and held that the lien of a judgment takes effect from the morning of the first day of the term, and is superior to a lien attaching at any hour during the same day.

Wolverton v. *The State of Ohio.* Error. Birchard, C. J., held,

That on an indictment for bigamy, the confessions of the accused may be given in evidence to prove the former marriage being solemnized out of the State. *Judgment affirmed.*

Leonard, for the use, &c., v. *Sweetzer.* Assumpsit. Avery, J., held,

1. That a guaranty of the fulfilment of the contract written below the contract, and executed at the same time, subjects the guar-

antor as an original contractor; and a suit may be sustained against both parties jointly, or against either separately.

2. That an averment in the declaration of "value received" found in such a contract, is a sufficient averment of consideration.

Gray et al. v. *May et al.* Chancery. Read, J., held,

1. That a suit, brought to enforce a deed of trust executed to a trustee, to indemnify the *cestui que trust*, as security, the original grantor being dead, and the *cestui que trust* having executed a new note with endorsers, and taken up the old notes, and having assigned his interest in the trust property to his endorsers as indemnity; and such endorsers having been compelled to pay the same, they may pursue the trust fund against the heirs of the original party, without making his personal representatives, or his widow, or the assignor of the deed of trust, parties.

2. That on a decree taken *pro confesso*, and a reference to a master to state an account, the Court will not, on Bill of Review, reverse the decree because some irregularities may have occurred in not exhibiting in the record the whole proof upon which the master based his report, but that positive error must appear.

3. That notice of publication, if so specific as to advise the respondents of the nature of the interest which may be affected by the proceeding, is sufficient.

4. That in subjecting a trust fund, taxes paid by the *cestui que trust* are a lien upon the land, and may be paid out of the trust fund.

5. That the Court will not reverse a decree on Bill of Review, because a defence may have existed, but which was not set up. In such case the respondents should have appeared, and if non-residents, and served with notice by publication, opened the decree under the statute.

6. If the original debt is barred by the statute of limitations at law, the Court will not, on that account, deprive the *cestui que trust* of his equitable security, and refuse to compel an execution of the trust. *Bill dismissed.*

White v. *Denman et al.* Chancery. Birchard, C. J., held,

That an instrument executed as a mortgage, with but one subscribing witness, cannot be so reformed in equity as to defeat a subsequent judgment lien; but that, *as between the parties*, it will be regarded in equity as a good and valid mortgage.

Spiller v. *Nye's Lessee.* Error. Avery, J., held,

1. That the rule that monuments control course and distance is subject to exceptions.

2. That the proceedings of the sheriff at the time of levy and preparatory to the making of it, may be proved by parol.

3. That the intention of the sheriff in passing title to the debtor's land, to levy upon a given quantity, may be inferred as well from the law regulating his duty, as from the character of the description given in the deed. *Judgment reversed.*

Turney v. *Yeoman et al.* Chancery. Read, J., held,

1. That a defective description of land listed for taxation, cannot be cured by the descriptions and recitals in the tax deed, or by other proof.

2. That a tax deed, under the statute, is only *prima facie* evidence of title, and its validity may be destroyed by showing that the requisitions of the statute authorizing the sale, have not been complied with.

3. That to list land as a specific number of acres in an original survey, without pointing out in what part of such survey, is too vague, and that a sale for taxes, by such a description, will pass no title to the purchaser. *Bill dismissed.*

Webster v. *Harris et al.* Chancery. Birchard, C. J., held,

1. That a certified copy from the office of the County Recorder, of an instrument not required to be recorded, cannot be given in evidence as proof of the execution and contents of the lost original, but with other proof of the execution of the instrument it may be evidence to prove the contents of the original.

2. That where the intention is palpable, and the consideration has been paid, the contract will be so reformed as to conform to the manifest intention of the parties.

3. That where the terms of a power are departed from under circumstances that justify the belief that the departure was made pursuant to the parol assent of the principal, the contract will be enforced, if in other respects there are no objections.

4. That when the general and specific prayer of a bill are sufficient to meet the principal object of the complainant, the prayer is sufficient. *Decree for Complainant.*

Penn et al. v. *Cox et al.* Chancery for Partition. Avery, J., held,

That when A had conveyed land to B, the brother of A, and to C, the wife of B, and when C had died without issue, her undivided half of the land descended to her brothers and sisters.

Duke v. *Thompson et al.* Chancery. Hitchcock, J., held,

1. That so long as the title to land remains in the government, the statute of limitations does not run against one who holds a certificate of survey or of purchase.

2. That the assignment of a land warrant or certificate of survey in the Virginia Military District, may be presumed in favor of a person in possession of land in said District, from great lapse of time, in connection with evidence of payment made by the person in possession, or those under whom he claims, to the rightful owner.

Thomas v. *Cronise.* Chancery. Read, J., held,

That where a deed of land has been executed upon the consideration of a bet upon the result of an election, and delivered, the parties being in *pari delicto*, the Court will not set aside the deed, but will leave parties as it finds them. *Bill dismissed.*

White et al. v. *Richmond et al.* Error. Birchard, C. J., held,

1. That an objection that might have been taken to evidence on trial to a jury, but which was not taken, will be considered as waived, and not noticed on error.

2. A promissory note, payable to A B or order, for $500, *in current Ohio funds*, is a note for a sum certain within the meaning of the statute, and negotiable. *Judgment affirmed.*

Major et al. v. *Armstrong et al.* Chancery. Avery, J., held,

1. That if sureties neglect when judgment is rendered, to cause the entry to be made that they are sureties, as required by statute, equity will not compel the judgment creditor to exhaust first the property of the principal.

2. That two executions of the same kind may be issued on the same judgment, and Courts of law having power over the subject to restrain any abuse of process on the part of the judgment creditor, equity will not interfere. *Bill dismissed.*

Holliday et al. v. *Franklin Bank of Columbus et al.* Chancery. Read, J., held,

1. That where there is a senior judgment not levied within the year,

a junior judgment and levy which gives it preference, and an intervening mortgage. which holds as against the junior judgment, the senior judgment shall be first satisfied; next the mortgage; and that the junior judgment is postponed to both.

2. That a mortgage has no effect either in law or equity previous to its delivery to the Recorder of the county for record.

3. That where a mortgage is delivered to the Recorder for record on the first day of Court, but previous to the hour at which the Court actually convenes, it will prevail against the lien of a judgment rendered at the same term.

Galloway et al. v. *Lessee of Brown.* Error. Birchard, C. J., held,

1. That where a patent contains a call for a corner and line not established at the time of the survey, it is not a controlling call, and will not govern course and distance.

2. That the call for the corner and line of A, in a patent, is to be taken as the call for a corner and line of A as established at the time of the survey, and not as they might thereafter be established by A in surveying his entry. *Judgment reversed.*

Baxter v. *Trustees of Columbia Township.* Error. Avery J., held,

1. That error does not lie to reverse the judgment of the Court of Common Pleas, in a case arising under the act to provide for the support and maintenance of illegitimate children, but that the proper remedy is by *certiorari.*

2. That under that act, it is error to proceed to the trial of the accused without the presence and testimony of the mother of the illegitimate child in open Court. *Certiorari allowed.*

Thivimor v. *Lessee of Slocum et al.* Error. Hitchcock, J., held,

1. That under the law of 1822, "providing for the remission of penalties, and for the sale of land for taxes," the County Auditor is a competent witness to prove that a list of judgments, as provided in the act, was delivered to him.

2. That under the same law, due notice of sale may be proven by the production of a newspaper containing an advertisement of the notice, accompanied by proof of publication for the requisite length of time.

3. That under the same law, the books of the County Auditor may be given in evidence to prove that the land was offered for sale, and not sold; although in entries in the said book there may be some irregularities.

4. That the forfeiture of land to the State for non-payment of

taxes, does not invest the former proprietor of title, so as to prevent him from maintaining an action of ejectment against one in possession, and claiming under the State.

Avery, J., dissented to the second point, holding that there should be *record evidence* of the publication of notice.

Cockerell v. *The Cincinnati Mutual Insurance Co.* Error. Read, J., held,

1. That a policy of insurance must be in writing.

2. That a verbal waiver of forfeiture is not valid.

3. That a verbal agreement that a policy which has been forfeited by a transfer of the interest of the assured by judicial sale, that on repurchase by the assured, the policy should re-attach and continue during the unexpired term, must, whether regarded as a waiver or a forfeiture, or a verbal policy, or an agreement to continue the old policy, to have any binding obligation, be in writing. *Judgment affirmed.*

Haywood v. *Foster.* Error. Birchard, C. J., held,

1. That a witness, in narrating a conversation held between himself and another, cannot be permitted to testify what he meant by the questions propounded by himself, but that his meaning must be gathered from the import of the question without the aid of a subsequent explanation of his own meaning.

2. That in an action of slander, on a plea of the general issue, the defendant may give in evidence in mitigation of damages any circumstances tending to show that he spoke the words under a mistaken construction placed upon conduct which was, in fact, no justification. *Judgment reversed.*

Millikin et al. v. *Lessee of Lyne Starling, jr.* Error. Avery, J., held,

1. That a patent for land from the United States will not be declared void, merely because the evidence to authorize its emanation is deemed insufficient.

2. That a deed under sale for taxes made in 1827, and before the date of the patent, cannot be given in evidence afterwards to defeat the patent. *Judgment reversed.*

Frirche v. *Lessee of Kramer.* Error. Hitchcock, J., held,

1. That a purchaser at Sheriff's sale, under an order for the sale of mortgaged premises, is invested with all the interests of the mortgagee in the land, and so far as the lands are concerned, is subrogated to the rights of the mortgagee.

2. That as between the mortgagor and mortgagee, and those claiming under them, after condition broken, the estate becomes absolute in the mortgagee, subject, however, to be redeemed at any time before foreclosure.

3. That a purchaser from the mortgagor, whose purchase was made subsequent to the date of the mortgage, cannot maintain ejectment against the purchaser at Sheriff's sale, although such subsequent purchaser was not a party to the proceedings in Chancery.

4. That in such case, the purchaser may maintain a bill to redeem. *Judgment reversed.*

Johnson v. *Bentley et al.* Assumpsit. Read, J., held,

1. That the 23d section of the act of 1824, to regulate judicial proceedings where Banks and Bankers are parties, only suspended the rights of actions upon notes and bills of unauthorized Banking associations, conferred by the act of 1816, prohibiting the issue and circulation of such paper, and that by the repeal of said 23d section, by the act of 1840, the right to sue upon such paper was restored.

2. That the question of the forfeiture of a charter will not be inquired into collaterally.

Horton v. *Horner.* Bill of Review. Birchard, C. J., held,

That a contract made in the State of New York for the payment of money there, the maker residing there at the time of its execution, is controlled by the law of that State. *Bill dismissed.*

Portsmouth Insurance Co. v. *Brazee, Kauffman & Co.* Error. Avery, J.., held,

1. That abandonment is not always necessary in cases of total loss.

2. That upon such loss, the sum insured in a valued policy, is the measure of damages, and is not to be reduced on account of any expenses required in the management or sale of the damaged property. *Judgment affirmed.*

Steamboat Champion v. *Jantzen.* Error. Hitchcock, J., held,

That under the act "providing for the collection of claims against Steamboats and other watercraft, and authorizing proceedings against the same by name," an action of assault and battery cannot be maintained against the watercraft for trespass committed by one of its officers, while the craft is beyond the territorial jurisdiction of this State. *Judgment reversed.*

Chesnut v. *Lessee of Shane.* Error. Birchard, C. J., held,

1. That a deed of a married woman is valid and passes her estate where there exists no other objection than that the Justice, in certifying the acknowledgment, has omitted incorporating into the certificate the statement that before and at the time of her making such acknowledgment, he made the contents known to her by reading or otherwise.

2. That an act of the Legislature that divests vested rights, that violates contracts, or that assumes to control or exercise *judicial powers*, is unconstitutional and void.

3. That the act of March 9, 1835, is not liable to either of these objections, and is a valid law.

4. That a confirmatory act, which merely assumes to cure an informality in the certificate of the magistrate, creating no new title, and affecting no right but such as equitably flows from the grantor, that merely accomplishes what upon the principles of natural justice a Court of Chancery ought to decree, may have a retrospective operation, when the manifest design of the Legislature was that it should thus operate.

5. That in construing ancient statutes, contemporaneous construction as evidenced by usage, will not be departed from without most cogent reasons, and if the construction be doubtful, usage will control.

The cases of *Connell* v. *Connell*, *Good* v. *Zercher*, *Meddock* v. *Williams*, and *Silliman* v. *Commins*, were overruled, and in the case at bar the judgment below reversed.

Lessee of Perry v. *Clarkson et al.* Ejectment. Read, J., held,

1. That a sale of land by an administrator under an order made under the act of 1795, after the repeal of that act, by the act of 1805, conferred no title on the purchaser.

2. That the proviso of the act of 1805 does not embrace the proceedings of an administrator, instituted to sell land under the act of 1795. *Judgment for defendants.*

Place v. *Sweetzer et al.* Chancery. Avery, J., held,

1. That partnership goods may be levied upon under an execution against one of the partners for his individual debt.

2. That the sale in such case may be restrained by injunction till the interest of the partner is ascertained.

3. That the interest of the partner is his share of the surplus, after all demands against the firm, including those of the individual

partners, are paid. *Referred to a Master, to state an account on these principles.*

Way v. *Hillier et al.* Motion. Hitchcock, J., held,

1. That an original decree in Chancery cannot be stayed, unless upon petition for review, and on motion to the Court of the county in which such petition is filed.

2. That such original decree cannot be stayed by the order of one or more Judges of the Court, or by the Court in Bank.

Talbert and others v. *The State of Ohio.* Case arising under the Tax Law. Avery, J.. held,

That the 26th section of the act amendatory of the Tax Law, which taxes rents reserved in leases in fee, for life, or for a term of fourteen years or upwards, renewable aud chargeable upon any real property within the township, which rents are to be assessed to the person entitled to receive the same, as personal property, at a principal sum, the interest of which, at the legal rate per annum. shall produce a sum equal to such annual rents, is constitutional. *Decision of Auditor of State sustained.*

Witherow v. *Witherow.* Error. Hitchcock, J., held,

1. That so long as a special contract remains open and subsisting, it is obligatory and binding upon the parties, and if suit is brought upon the same, it must be special action upon the contract. *Indebitatus assumpsit* will not lie.

2. That a vender of personal property, the property to be delivered within a specified period, and payment to be made for the same upon a day certain, after the period within which delivery was to have been made, failing to deliver the entire property within the time specified, cannot recover in *indebitatus assumpsit* for the part delivered, unless there is a sufficient excuse for the non-delivery of the residue.

Read, J., dissented, holding,

1. That on a contract, entire in words, but divisible in subject matter, if the contract be part performed, an action will lie to recover to the extent of the benefit received, after the time has expired for the completion of such contract.

2. That in such case any damage sustained by the breach of the contract may be given in evidence to reduce to the extent of such damage the amount to be recovered; but if the damage be greater

than the benefit received by such part performance, the defendant cannot have judgment for the balance.

3. That the defendant is not compelled to set up such damage by way of defence, but may resort to his cross action.

4. That an action on a contract for the sale of goods and chattels, if the vendor receive part and retain them, the law implies the obligation to pay for such goods and chattels so detained.

Channel et al. v. *Fassit et al.* Chancery. Birchard, C. J., held,

That a person cannot claim to be a member of a partnership composed of a number of persons, unless all the persons composing the firm have agreed to accept him as such. Nor can he claim contribution and account against a firm without making all the partners parties defendants to his bill. *Bill dismissed.*

Collins et al. v. *McCracken et al.* Bill of Review. Read, J., held,

That a mortgage of personal property, when the possession is retained by the mortgagor, with the power of sale and disposition reserved, is fraudulent and void in law as against subsequent purchasers, and execution creditors. *Bill dismissed.*

Mewhorter et al. v. *Armstrong et al.* Chancery. Avery, J., held,

That where a bill is filed to vacate the sale of land by an Administrator, and the bill shows that said sale is void, because the Court granting the order of sale had no power to grant such order, the bill will be dismissed, on the ground that the complainant has adequate remedy at law. *Bill dismissed.*

Smith and wife v. *Handy.* Chancery. Hitchcock, J., held,

That if a married woman unite with her husband in granting part of a deed conveying his land, she is thereby barred of her right of dower as against all those who claim under said deed. *Bill dismissed.*

Myers, Fall & Collins v. *Hewett et al.* Chancery. Read, J., held,

1. That the lien of a senior judgment which has not been levied within the year after the rendition of judgment, will not be cut off by a decree of foreclosure upon a junior mortgage, order of sale, and confirmation of sale, within the year after such decree was pronounced.

2. That a judgment creditor may, after levy, file a bill to remove the cloud upon the title caused by such judicial sale, and subject the land again to sale, or subject the fund arising from such sale to the satisfaction of the judgment.

3. That although a decree upon foreclosure of a mortgage may be so framed as to permit execution to issue as upon judgments at law, to collect any balance which may remain after exhausting the mortgage premises, yet such decree does not operate as lien upon other property, before levy.

4. That the only decrees in Chancery which give a lien under the Statute, are decrees for the payment of money, and that a decree of foreclosure of a mortgage is not such a decree. *Decree for Complainant.*

The State, on relation of Kemper, v. *Lyman Beecher.* Quo Warranto. Birchard, C. J., held,

That proceedings cannot be held under the statute regulating writs of *quo warranto* to oust an officer, where the cause of ouster originated and existed more than three years prior to the filing of the information. *Judgment for the Defendant.*

Gamble et al. v. *Warner and wife.* Error. Birchard, C. J., held,

That where a summons was issued against three defendants, a return in these words—"Served by leaving a copy of this writ at the residence of the within named defendant"—is not a good service as to all or either of the defendants. *Judgment reversed.*

The Little Miami Railroad Company v. *Perrin et al.* Certiorari. Avery, J., held,

1. That where land has been entered upon the Company, valued under a Judge's warrant, and an appeal from the valuation has been taken and carried into the Common Pleas, it is error in that Court, to order the warrant and proceedings under it to be quashed.

2. That though the warrant contain no statement of an attempt to purchase the land of the owner, of his disability in law to contract, or of his absence from the country, or that the land appropriated is indispensable for the construction of the road, the Common Pleas have jurisdiction of the case by appeal. *Orders of the Common Pleas reversed.*

Read, J., dissented.

Goodsell v. *Brig St. Louis.* Error. Hitchcock, J., held,

That an action for supplies furnished to a Steamboat, or other watercraft, cannot be sustained against the boat by name, unless such supplies were furnished while the craft was navigating the waters *within or bordering upon* this State. *Judgment affirmed.*

Bank of Virginia v. *Bank of Chillicothe.* Error. Read, J., held,

1. That where a case is submitted to Court to try the facts as well as determine the law, the finding of the Court cannot be brought under review by writ of error, unless the evidence be made part of the record by bill of exceptions.

2. That an agreed statement of facts forms no part of the record, unless made so by the bill of exceptions.

3. That the only mode of bringing the evidence under consideration upon writ of error is by bill of exceptions upon a motion for a new trial, and exceptions to the ruling of the Court, or by bill of exceptions to the ruling of the Court upon the evidence, during the progress of the trial.

4. That upon error, the finding of the Court will be treated precisely as the verdict of the jury. *Judgment affirmed.*

The City of Cincinnati v. *Coombs et al.* Error. Birchard, C. J., held,

1. That an Ordinance of the City Council which provides for the review of damages assessed to the owners of property appropriated in opening a street, and does not secure to each party aggrieved a right to select two of the five freeholders composing said board of reviewers, violates the act passed March 16, 1839.

2. That the City Council cannot justify under proceedings which are a violation of the charter, and a party having sought redress under a mistaken belief that the City Council had provided adequate means, may abandon that remedy, and seek it by action. *Judgment affirmed.*

Somers v. *Hains.* Error. Hitchcock, J., held,

That a promissory note cannot be given in evidence without proof of its execution, unless specially declared upon. *Judgment reversed.*

Commissioners of Crawford County v. *Commissioners of Marion County.* Certiorari. Read, J., held,

That if in the erection of a new county, so much of an old county be detached as to reduce it below its constitutional limits, and other territory be attached to make up the deficiency, such county does not thereby become entitled to any portion of the funds in the treasury of the county from which such territory was taken. *Judgment affirmed.*

Martin v. *The State of Ohio.* Error. Birchard, C. J., held,

1. That on a trial for murder, where one of the thirty-six jurors

summoned by the sheriff, is excused on his own application, it is not error for the Court to refuse to order the sheriff to summon another to take his place, before all the remaining jurors in the list have been called.

2. That the defendant is entitled to twentv-three, and only twenty-three peremptory challenges.

3. That the Attorney appointed by the Court to assist the Prosecuting Attorney, need not be sworn, nor give bond.

4. That it is not error to refuse to listen to an argument from the defendant's counsel in opposition to the appointment of an Assistant Prosecutor.

5. That where a juror states that he is on principle opposed to the infliction of capital punishment, and that his opinion will influence his decision against the law and the evidence, he may be challenged by the State for cause.

6. That when in the trial of a case it becomes material to inquire of what materials a certain string is composed, which is in Court, it may be left to the jury to decide upon inspection. *Judgment affirmed.*

Carroll et al. v. *Lessee of Olmsted et al.* Error. Avery, J., held,

That the special act passed by the Legislature January 7, 1813, authorizing a partition and sale of the lands of the devisees of Aaron Olmsted deceased, was constitutional and valid, and the sales made by the trustees named in the act are legal, and a bar to any claim of title set up by said devisees, or any person claiming under them, *Judgment reversed.*

Baker v. *Lessee of Gittings.* Error. Hitchcock, J., held,

That by the practice of the Courts of Ohio, no notice to quit is necessary before the commencement of an action of ejectment. *Judgment affirmed.*

Cartright v. *Sole.* Certiorari. Read, J., held,

That the judgment for costs on the affirmance or reversal of a judgment in error, only embraces the costs of the proceeding in error—not the costs of the Court below. *Judgment affirmed.*

Reid and Ormsby v. *Joseph Quigley.* Error. Birchard, C. J., held,

That an appeal from the Common Pleas to the Supreme Court, must be taken by the party to the suit, and an appeal bond, reciting that one not a party to the suit has taken an appeal, is upon its face

void, as against public policy, and cannot be enforced. *Judgment reversed.*

Tuat v. *Canal Boat Etna.* Motion for new trial. Avery, J., held,

That under the act providing for proceedings against Steamboats and other watercraft by name, where a person has engaged to build and deliver a boat at a future day, at a specified price, and has delivered the boat in pursuance of such agreement, he cannot afterwards proceed against it in the possession of a third person, to recover for "materials, supplies and labor," expended in building the same. *Motion overruled.*

Culbertson v. *The City of Cincinnati.* Chancery. Hitchcock, J., held,

That a Court of equity may restrain by injunction the collection of a special tax levied by the city authorities without authority of law. *Injunction made perpetual.*

Sargent v. *The State of Ohio.* Error. Read, J., held,

That a recognizance to appear and answer to a criminal charge taken by a single Judge must be returned, and a memorandum thereof entered upon the minute book of the Court, to make it obligatory, and matter of record; and that a declaration not averring such return and memorandum, and counting upon it as a common law bond, and not as a record, is defective, and will not support a judgment upon such recognizance. *Judgment reversed.*

Morris v. *Way et al.* Chancery. Birchard, C. J., held,

1. That a deed of trust passes the legal title, and though given to secure a debt, and so drawn as for most purposes to be treated as a mortgage, yet as between the grantor and grantee, the estate so passes that nothing remains in the grantor which can be le ied upon and sold upon execution at law.

2. That the Miami Exporting Company had the capacity to receive a conveyance to secure the payment of a just debt, and when such conveyance stipulates for the security of such debt, and also for the security of notes which embrace unlawful interest, the deed is not wholly void, and will be treated as good for the security of the valid note, and null as to those only which are void for want of capacity in the Bank to receive them. *Decree for Complainant.*

Douglas v. *Renick's heirs.* Ejectment. Avery, J., held,

1. That when a summons has been served upon a part only of

several named as defendants, and judgment is rendered against all, the judgment is erroneous and voidable, but not void.

2. That if land be sold by virtue of an execution upon such judgment, a title to a proportion, if not the whole, will pass to a purchaser at the Sheriff's sale.

3. That lands on the death of the ancestor intestate, descend to the heirs, and may be sold on execution against the heirs, but subject to the rights of the Administrator, in case they are needed for the payment of the ancestor's debts. *New trial granted.*

Foster et al. v. *Kerns.* Certiorari. Read, J., held,

1. That an order of Court, confirming a sale in Chancery, is such a final sentence or decree as authorizes an appeal to the Supreme Court.

2. That the legality of such sale and confirmation cannot be questioned on certiorari. *Certiorari dismissed.*

Barts v. *Abbe.* Error. Birchard, C. J., held,

1. That a service of summons in Forcible Detainer, on the 6th day of a month, returnable on the 9th, is good service.

2. That when complainant states that "the defendant doth unlawfully and forcibly, and with a strong hand detain," &c., it is sufficient.

3. That in such case the Justice is not authorized to sign and enter upon his docket a bill of exceptions; and if he does, it will not be regarded by the highest Court upon error.

4. That the action of Forcible Detainer lies in favor of a purchaser at Sheriff's sale, made under a decree in Chancery.

5. That the action will lie, though the Sheriff's deed has not been executed, after the confirmation of the sale. *Judgment affirmed.*

Showers v. *Lessee of John Emery.* Error. Read, J., held,

1. That an action for ejectment where the plaintiff produces deeds showing title in himself, and gives evidence of a contract for exchange of the lands in controversy for other land from the defendants with stipulations for the execution of deeds on the performance of certain conditions, and of non-performance of the conditions on the part of the defendant, and of notice to the defendant to quit the premises, and of a rescision of the contract of exchange, there is not such a failure of evidence on the part of plaintiff as to warrant a non-suit. *Judgment affirmed.*

Fuller v. *Pelton.* Error. Hitchcock, J., held,

That under the statute of this State, when a plea is interposed of a tender of the amount due the plaintiff, made before the commencement of suit, and issue is found for the defendant, the proper judgment to be rendered, is a judgment in favor of the plaintiff for the amount due, and in favor of the defendant for costs.

Ohio on the relation of Walker et. al. v. *The Board of Public Works.* Birchard, C. J., held,

1. That the Legislature cannot by declaring a river navigable, which is not so in fact, deprive the riparian proprietors of their right to the use of the water for hydraulic and other purposes, without rendering them compensation.

2. That the Resolution of the Legislature passed March 12, 1845, providing for the assessment of damages to the riparian proprietors upon navigable streams, extends to all streams which have been by the Legislature declared navigable.

Hobon v. *Bidwell.* Error. Avery, J., held,

That delivery under a contract of sale is not essential to pass the title to personal property. *Judgment reversed.*

Wayne v. *The Steam Boat General Pike.* Error. Birchard, C. J. held,

1. That in Bills of Lading where the terms used have by usage acquired a particular signification, they will be presumed to have been used in that sense.

2. That usage will not be permitted to control the terms of a Bill of Lading unless made out by clear and satisfactory proof. *Judgment reversed.*

Hockspringer v. *Ballenburg.* Error. Avery, J., held,

1. That the affidavit directed by the 3d section of the act to abolish imprisonment for debt, is not defective because it states the ground for a capias in the 4th "particular" of that section in the words of the act merely, to wit: "That the debtor is about to dispose of his property with intent to defraud his creditors."

2. That an endorsement upon the writ, of the amount for which the defendant shall be held to bail, is not necessary. *Judgment affirmed.*

Lexington Insurance Company v. *Pavor.* Error. Hitchcock, J. held,

1. That the party holding the affirmative of an issue is entitled to

open and close the evidence and argument. If any thing remains to be proven affirmatively by a plaintiff, he must always open.

2. That in cases where the testimony upon any particular issue, leaves it doubtful whether the affirmative of that issue is sustained, it is a safe and proper course for the jury to find against the party holding the affirmative.

3. That in an action upon a Policy of Insurance, if it shall appear that any matter in reference to a description of the property and which would increase the risk, is not made known by the insured, such concealment will avoid the policy. It is otherwise, however, if the matter concealed could in no way increase the risk.

4. In such action, the Court are not bound to instruct the jury upon hypothetical propositions, which are in no shape connected with the issues joined between the parties. *Judgment affirmed.*

Clinton Bank of Columbus, for the use of Rhodes v. *Ayers and Neil.* Error. Birchard, C. J., held,

1. That where a note is made payable to a Bank, and signed by a surety, presented to the Bank for discount and refused, and afterwards discounted by a third person, without the knowledge of the surety, an action will not lie at the suit of the Bank for the use of the person discounting the note against the surety.

2. Such an action will be against the principal in the note. *Judgment affirmed as to Neil, and reversed as to Ayers.*

Johnson v. *Miller.* Replevin. Read, J., held,

1. That a contract by which one party stipulates to furnish capital for the purchase of wheat to stock a mill, and the other party to act in conjunction with an agent of the first in the purchase of the wheat, convert it into flour, and after deducting 2½ per cent. and the original cost of the wheat to have the residue of the proceeds of the sales of the flour, does not constitute a partnership.

2. That in such case the wheat is the property of the person furnishing the capital, and not subject to levy as the property of the manufacturer. *Judgment for Plaintiff.*

Lessee of Burridge v. *Beardsly.* Motion for new trial. Birchard, C. J., held,

That when a deed purports to be executed for *valuable* consideration, and is impeached by proving that no such consideration passed, it cannot be sustained by proving that it was executed in consideration of natural love and affection. *New trial refused.*

Clark v. *Strong et al.* Bill of Review. Avery, J., held,

1. That a Bill to subject an equitable interest in land, in pursuance of the 16th section of the act directing the mode of proceeding in Chancery, must show a judgment recovered, and that there is not real or personal property of the debtor sufficient to satisfy the same.

2. That a Bill so filed does not prevent the assignment of such equity to a third person, not a party to the proceeding in Chancery. *Bill dismissed.*

Lewis, Trustee of the Mechanics and Traders Bank v. *McIlvaine.* Error. Hitchcock, J., held,

1. That the act of March 8, 1845, authorizing William Lewis, Trustee of the Mechanics and Traders Bank of Cincinnati, to prosecute suits against the debtors of the Bank, is not a void act.

2. That under said act, Lewis, as Trustee, may commence and prosecute a suit at law against a debtor of said association, though such debtor is a stockholder. *Judgment affirmed.*

Merrill v. *Lake et al.* Chancery. Read, J., held,

1. That the Supreme Court cannot, by injunction, restrain the prosecution of a suit in the Court of Common Pleas, and take jurisdiction of the same subject matter.

2. That when the Supreme Court and Court of Common Pleas have equal and concurrent jurisdiction, and the Court of Common Pleas once gets possession of a case, it will retain it for final disposition.

3. That the Supreme Court will not, at the suit of a stockholder, take jurisdiction of distinct and separate matters, and unite the settlement of the transactions of a corporation in one suit, because such single litigation might prevent a sacrifice of property, and be most beneficial to stockholders and creditors.

4. That persons having distinct, separate and independent claims, cannot be compelled to prosecute them in a single suit.

5. That an injunction to restrain a decree is unknown to Chancery; but as such restraining power is exercised in a different form in other Chancery Courts, not suited to our system, whether a case might not arise which would authorize an injunction: *quere.* *Bill dismissed without prejudice.*

Birchard, C. J., dissented.

Hickman et al v. *Meese et al.* Chancery. Birchard, C. J., held,

1. That the 4th article of chapter six of the German Lutheran Reformed Congregation of St. Paul's Church, Columbus, does not connect them unalterably and forever with the Evangelical Lutheran Synod of Ohio, and the adjacent States.

2. That their connection with the Synod was voluntary, and a dissolution of the connection was no violation of the condition upon which the Church property was holden by the congregation. *Bill dismissed.*

Sample v. *Ross, Administrator, &c.* Chancery. Avery, J.. held,

1. That an injunction cannot be issued by the Common Pleas to restrain an execution of the Supreme Court upon a decree of alimony.

2. That the remedy is by application to the Supreme Court, on the return of the execution. *Injunction dissolved, and Bill dismissed.*

Baker, for the use, &c., v. *Joseph Thompson.* Error. Hitchcock, J., held,

That under the act of 1834, allowing a defendant in an action upon a sealed instrument, to set up a failure of consideration as a defence, to make such defence available the defendant must prove a total failure of consideration, or a total failure as to distinct parts of the contract. *Judgment reversed.*

Nisewanger v. *Wallace et al.* Chancery. Avery, J.,

That a party claiming an equity in land before the emanation of his patent from the United States, in order to gain a priority over another who claims an equity in the same land, must establish by proof that his entry was by virtue of a valid warrant, and trace his connection with the same warrant. *Bill dismissed.*

Sea v. *Carpenter et al.* Bill of Review. Hitchcock, J., held,

That where an agent is unfaithful to the trust, and abuses the confidence reposed in him by his principal, where he misconducts himself in the business of the agency, he may be deprived of commission or compensation. *Bill dismissed.*

Holcomb v. *Roman.* Error. Hamilton. Read, J., held,

That a plea of certificate of final discharge in Bankruptcy, in a voluntary application, is good, without setting forth the facts neces-

sary to show the jurisdiction of the Court granting the certificate. *Judgment reversed.*

Steamboat Albatross v. *Wayne.* Error. Hamilton. Birchard, C. J., held,

1. That a witness can only testify to facts, not to legal inferences, deducible from facts.

2. That a question propounded to a witness in this form: "What do you know, if any thing, of any custom of trade, in delivering goods at Memphis, by steamboats, different from the usages of other ports on the Mississippi river?" is in proper form.

3. That a local custom at Memphis, regulating the mode of delivering goods there, is not binding on shippers at Cincinnati, unless known to merchants and shippers abroad.

4. That the Supreme Court will not reverse the judgment of an inferior Court, though the Judge may have charged incorrectly upon a point not material to the correct determination of the case. *Judgment affirmed.*

Court adjourned without day.

EXCHEQUER OF PLEAS.

WAINMAN *v.* KYNMAN.

STATEMENT OF LIMITATION—PART PAYMENT.

THE plaintiff applied to the defendant for £15, as interest due on a promissory note, made by the defendant. Defendant gave the plaintiff a sovereign, stating that he had paid her £4 in April, that he owed her the money, but would not pay it. The Judge directed the jury that the mere fact of part payment was of itself conclusive to take the case out of the statute of limitations. Held, that this was erroneous. To take the case out of the statute, the circumstances must be such as to warrant the jury in inferring a promise. The facts ought to have been left to the jury. The mere fact of payment of itself does not necessarily take the case out of the statute. *New trial granted. Vide Hart* v. *Prendergast, vol.* 4 *W. L. J.* 10; *Tanner* v. *Smart,* 13 *E. C. L. Reports,* 273.

NOTES OF RECENT DECISIONS.

Okill v. *Whittaker*. *English Chancery*, 1847. [16 *L. J. Rep.* 454.]

VENDOR AND PURCHASER—MISTAKE AS TO DURATION OF TERM OF YEARS.

A bill was filed to obtain a re-assignment of some leasehold tenements, which had been assigned to a purchaser for the residue of a term of years, to be computed from a specified time. It was afterwards discovered that the term did not commence till several years later, and that the lease would exist for twelve years longer than had been supposed: Held, that the vendors were not entitled to any relief.

Doughty v. *Boughman*. *Queen's Bench*, 1847. [16 *L. J. Rep.* 414.]

COVENANT, NATURE OF—WHAT RUNS WITH LAND—PRIVITY.

A, by indenture, demised to B certain premises, and B covenanted for himself, his heirs, executors, administrators and assigns, to build certain houses on the land within two years.

B underlets to C, and covenants for himself and his heirs, executors and administrators to observe and perform, or effectually to indemnify C against the covenants in the first indenture, and afterwards assign his reversion to D.

A, having entered and ejected C, by reason of the non-performance of the first mentioned covenant: Held, that B's covenant with C did not run with the land, and that D was not liable to C.

Pemberton v. *Colls*. *Queen's Bench*, 1847. [16 *L. J. Rep.* 403.]

SLANDER—IMPUTATION ON PROFESSIONAL CHARACTER—CLERGYMAN—VENIRE DE NOVO.

In an action for slander, the first count stated that the plaintiff was a clergyman of the United Church of England and Ireland, as by law established, and Vicar of W.; that the defendant was also a clergyman of the said United Church: that the defendant, intending to injure the plaintiff in his said character of a clergyman, falsely, &c., spoke the following words of and concerning the plaintiff, in his said profession of a clergyman: "The very day I (the defendant) came into residence, Dr. P. (the plaintiff) sent for me. I went and dined with him; and the wine must have been drugged, for I took but two glasses, and was quite stupefied. While in this condition, Dr. P., (the plaintiff,) put a bill into my hands, and requested me to sign it, saying, C, just put your name to this: I wish to have it as a security for the payment of £130 per annum for reading for you at the new church. I (the defendant) answered, will you give me a pen, and I will sign it, but I thought I had sufficiently satisfied you. Immediately I had signed it, Dr. P. (the plaintiff) snatched it up and walked to the fire in order to dry the signature, and laughing, said, This will be quite safe; I (the plaintiff) will take care of this. The bill, I (the defendant) think was drawn for £2,500: but having been stupefied with the wine, I do not rightly remember;" and also the following words: "You cannot suppose that I (the

defendant) can meet a man who so cheated me at my first coming:" Held good, as charging imputations on the plaintiff in his professional character.

The second count charged that the defendant spoke of and concerning the plaintiff in his said profession of a clergyman the following words: "Dr. P. (the plaintiff) placed before me a bill; I (the defendant) signed. I do not know for what amount it was, whether £2,000 or £3,000; for I was completely pigeoned by Dr. P. (the plaintiff):" Held, insufficient to sustain an action.

A general verdict having been given on both counts, a *venire de novo* was awarded.

Stead v. *Anderson*. *English Common Pleas*. [16 *L. J. Rep.* 250.]

PATENT—PLEADING—INFRINGEMENT—PROOF OF ISSUES.

Upon an issue of not guilty to an action for infringement of a patent, the question whether there was a fraudulent evasion of the patent does not arise.

In determining whether a defendant has infringed a patent, no question arises as to his intention, but only as to his acts.

A plea, that the plaintiff was not the first and true inventor, is proved by showing a publication before the plaintiff's invention.

A plea, that "before the letters patent, the invention had been, and was wholly and in part publicly and generally known, used, and practised, and published in England," sets up the single defence of user: Knowledge and publication before the letters patent is no denial of the plaintiff being the first inventor, and does not, therefore, render the plea double.

Rich v. *Basterfield*. *English Common Pleas*. [16 *L. J. Rep.* 273.]

CASE, ACTION ON THE—NUISANCE—LIABILITY OF THE OWNER OF REAL PROPERTY NOT IN OCCUPATION THEREOF.

A, the owner of a house, with a fire-place and chimney, demised it to a tenant from week to week. The tenant lighted fires, and from the position of the chimney, the emission of the smoke was a nuisance to B, the occupier of an adjoining house. More than one week elapsed, during which this nuisance continued, and A did not determine the tenancy. B brought an action against A for causing and continuing this nuisance, to which A pleaded not guilty, and not possessed: Held, that on both issues A was entitled to a verdict.

1. The owner of real property is not responsible for a nuisance committed and continued thereon by the tenant in possession.

2. If the owner of land demise it with an existing nuisance thereon, he is responsible for the continuance of that nuisance during the term; so if he be a party to the creation of a nuisance after the demise; but he is not responsible for a nuisance so created, though such nuisance be a probable consequence of the user of the land as demised.

3. An omission on the part of the owner of land to determine the tenancy after the creation by the tenant of a continuing nuisance thereon, is not equivalent to a fresh demise of the premises, so as to make him responsible for such nuisance.

Ramuz v. *Crowe*. *Exchequer of Pleas*, 1847. [16 *L. J. Rep.* 280.]

EXCHANGE, LOST BILL OF—RIGHT OF PAYEE TO BRING ACTION.

The payee of a negotiable bill of exchange having lost it, cannot, on its arriving at maturity, maintain an action upon it against the acceptor without producing it.

In an action by the drawer against the acceptor of a bill of exchange, the defendant pleaded, that after the acceptance and before action the plaintiff lost the bill;

that it still remained lost; that the plaintiff was not at the commencement of the suit nor then the holder of or possessed of the bill. Replication, that the bill had not been, either at the time it was lost, or at any time, endorsed by the plaintiff, or transferable by delivery, or capable of being enforced or put in suit against the defendant by any other person but the plaintiff; that up to and at the time of the loss, the plaintiff was always the holder of the bill, and still is alone entitled to be the holder; that at the time of action brought, the defendant had notice that the plaintiff was not the holder of the bill for the reason aforesaid: Held, that the defendant was entitled to judgment.

Insurance Bank of Columbus v. *Bank U. S. District Court for the City and County of Philadelphia*, 1841 [7 *Penn. L. Jour.* 129.]

CORPORATION—CONTRACT.

It is a general rule of law, that to bind a corporation by a contract, it must be made by the persons to whom the management of its affairs is, by law, committed.

The stockholders, even all of them, at a general meeting, cannot, even by a unanimous vote, bind the corporation by contract. Their action would at most be advisory, and not obligatory on the directors.

The directors may adopt, upon sufficient consideration, the act of the stockholders or of strangers, and thus make it binding on the corporation, but it is the act of *adoption* which makes it obligatory on the corporation, and not the original act of the parties.

The question of adoption is one of fact: what acts amount to an adoption, is a question of law.

If no other right or interest can be affected by the agreement of all the stockholders, the corporation may be bound thereby.

Illustration of the equitable nature of the action of assumpsit.

A party cannot sue upon a cause of action until it has accrued; but a defendant may defend by means of facts which occurred after suit brought.

If the officers or stockholders of a corporation make an agreement which is incompatible with the provisions of the charter, or in violation of the penal laws of the State, the offenders may be punished, and the franchises resumed,—but which considerations cannot defeat a contract between parties otherwise valid.

Campbell v. *U. S. District Court of the United States, Western District of Virginia*, 1847. [*Law Reporter* 401.]

COUNTERFEITING COIN.

The case of *Fox* v. *Ohio*, explained.

A law of the United States, prohibiting the circulation of counterfeit coin, is constitutional.

It is not essential to an indictment under such a law, that the offence should be charged to have been committed in territory within the jurisdiction of the United States.

Oakley v. *Aspinwall. Superior Court of the City of New York*, 1847. [10 *Law Reporter* 409.]

SECRET PARTNERSHIP.

Where money is advanced to a merchant, and the premium or profit for its use is not fixed and certain, but depends upon the accidents of trade, the person making the advance, will be liable as a partner to such merchant's creditors; although he is not to risk any part of his advance, or share in the losses of the trade.

Miscellaneous.

Supplement to the United States Digest. [Supplement to the United States Digest; being a Digest of Decisions of the Courts of Common Law and Admiralty of the United States. By John Phelps Putnam, of the Boston Bar. 2 vols. Boston: Charles C. Little and James Brown—1847.]

Although bearing the name of "Supplement" to the United States Digest, these two volumes contain more than four-fifths as much matter as that work. The first volume of the Digest, as prepared by Mr. Metcalf and Mr. Perkins, being the sole work of two hands, employed a long while in its arrangement, is the most systematic and uniform of the series. Next to this, in point of uniformity and completeness, are these supplementary volumes. Their size is owing to the fact that the second and third volumes of the work, (between the preparation of which, and that of the first volume, ten years elapsed,) brought down the Digest only to the date of the latest decisions contained in the early volume. This was the best system; and the principal objection made to the second and third volumes—that of the omission of many decisions—is mainly answered by a statement of the plan adopted. The absence of many decisions arises also from the fact that every case in equity in the reports, according to the original plan of the Digest, has been omitted, and in many of the States certain suits are instituted in equity, which in others are brought in the Courts of law. We are informed that a Digest of cases in equity to the 1st of January, 1847, is in preparation.

Still, these supplementary volumes are obviously superior to the second and third. They seem more the work of one hand, the statements of similar and analogous decisions are more simplified and compressed, and they give what we have missed in the other two volumes—references from title to title, and to a great extent, from case to case. A common defect in our larger Digests, is the incompleteness of their subdivisions of titles,—so that it is often necessary to read half the cases under a title to find where a case is, or rather where it is not. The arrangement, in this respect, in these volumes, is full without being involved; and those who have often searched in vain for a "needle in a hay-stack" of a Digest, will feel grateful for the editor's systematic care. There is, besides, at the commencement of the work, an elaborate and valuable "table of titles, divisions and subdivisions," which is not merely copied, as is usual, from the headings of titles, but contains copious references from one to another.

It will be gratifying to the profession that this work is at last completed, and that a gentleman who has in these volumes shown himself so competent for the task, is to prepare a yearly Digest of American Common Law, Admiralty, and Equity Reports, as they shall hereafter appear.

Oliver Smith's Will—Examination of a witness to prove his own sanity. The Supreme Court of Massachusetts, sitting at Northampton, some time ago, were occupied in the trial of the validity of the will of Oliver Smith. The will was contested on the ground that T. P. Phelps, one of the witnesses, was, at the time of attesting the will, an *insane person.*

On the trial, after ex mining the other witnesses, Mr. T. P. Phelps was called. He answered the ordinary questions properly. "Here," writes the correspondent of the New York Tribune, "it was thought his examination by the counsel calling him, would cease, and he would be given up to the fire of a cross-examination, according to the usual practice. But Mr. Webster thought otherwise. The other side had so far opened their case, as to show that they relied upon proving the insanity of this witness—and Mr. Webster seemed to think it a fine opportunity to turn their flank, by meeting their case at once, and *examining the witness himself on that very point.* This was somewhat of a surprise to the opposite party—but the occasion seemed to demand it, and Mr. Webster had no fear to meet it."

The Judge decided that he had a right to go on, and examine his witness at large.

"It was a delicate undertaking. The will had been attested by him in July, 1844. It was clear in evidence, that in August, 1843, he was out of his right mind, and had been to the hospital. Was it safe to take *his own* account of the various states of his own mind? the other side contending that his insanity of 1843 continued to the present moment.

"Against what seemed the general opinion, Mr. Webster, resting probably much upon the opinion of the father, ventured to examine Theophilus upon this delicate subject himself. He said that he was of sound mind, though not of good bodily health, being much troubled with headache and dyspepsia—that he had been thus more or less sick since 1840—that in 1843, an accident of his father brought on an excitement which caused a delirium and loss of sanity—that he knew it then, but could not control it—that he threw himself into the river in August, 1842—he can hardly tell why, but he got out again of his own accord—that this delusion or insanity lasted till the winter of 1844, when it went off—that in March, 1844, he wrote a little treatise 'A History of the Five Books of Moses,' which was published by the Tract Society—that when he attested the will he was perfectly free from delusion, insanity," &c.

The correspondent adds, that the witness went through the examination nobly, and in the cross-examination was still more successful. Nothing could make him ashamed to tell the whole truth about himself, although some things must have been exceedingly painful; nor could any multitude of questions, or ingenuity of interrogation, confute him. He saw everything as clear as light, and answered accordingly. His examination closed at sunset, and the Court adjourned.

The verdict of the jury sustained the will.

Court of Errors. In one of the Circuit Courts of a Western State, an indictment, during the temporary absence of the Prosecuting Attorney who had drawn it, was, on motion, quashed. On his return into the Court-room, on learning the fact, he expressed his surprise to the Court at the decision made, and commenced arguing the matter, when the Court observed to him that the law had already been decided against him. The attorney replied, that if it had been decided otherwise there would have been no necessity, on his part, for arguing the point, and continued his objections. The Court repeatedly interfered, but the attorney still continued to urge his views of the impropriety of the decision, and the Judge, who was from the State of New York, remarked, with some warmth: "Sit down, sir; if you are not satisfied with the decision of this Court, you can appeal to the Court of Errors." "Court of Errors!" ejaculated the attorney, with great emphasis,—"Court of Errors! if this is not a Court of Errors, I don't know where, under heaven, you will find one."

The same attorney, in the Supreme Court, when replying to some principle of law laid down by his opponent, which, in his view, was deemed rather absurd, remarked —"If this Court are going to decide *that* to be law, it is high time we had a Convention."

Case of Fraud A legal friend, while attending the Supreme Court of a neighboring State, had cause to complain of the frequent appearance of bread puddings upon the table of the hotel where he boarded. Finally, his patience becoming exhausted, he involuntarily exclaimed—"By ——, these bread puddings are a fraud on Lazarus."

Watercraft Law—Extra-State Operation. A correspondent thus speaks of a decision recently made by the Supreme Court of Missouri, of which we are promised a report. "The point decided was this—that, as to Steamboat liabilities incurred out of that State, the boat could not be sued in that State, uuder its Steamboat laws. I am informed, however, that the question yet remains open, whether it might not be done, in case it should be properly shown that, by the law of the State where the liability was incurred, the boat was liable." It will be seen by reference to preceding pages, that the Ohio Court in Bank has arrived at the same conclusion in regard to our Watercraft Law, both as to contracts and torts.

Michigan—Effect of the Abolition of Capital Punishment. The New York Tribune, speaking of a recent conviction of a negro at Detroit, of murder in the first degree, says: "It is now nearly two years since capital punishment was abolished in Michigan, and the above, if we are not mistaken, is the first case of murder that has occurred in the State since the law went into operation. If the predictions of the advocates of the gallows had been fulfilled, there would have been a grand saturnalia of murderers and cut-throats in the State before now. Is human life more safe in States adhering to the death penalty than in Michigan? Who believes it?

Beware how you lay hands on a Lady.—It was decided in the Court of Common Pleas of Boston recently, that laying the hands upon the shoulder of a lady was an assault punishable by law. We find the following report of the case, which gave rise to this decision, in the Post:

In the Common Pleas, yesterday a verdict was rendered in the case of *Plumber and Wife* v. *Carpenter*, for an assault on Mrs. Plumber. It appeared that the defendant keeps a dry good store; that Mrs. Plumber called at the store to see some braid; that as she was leaving the store a pair of gloves was missed from the counter; that the defendant followed her into the street, stopped her there by putting his hand upon her shoulder, told her that he had missed a pair of gloves, and requested her to go back to the store; that she returned to the store with him, and just as she entered, the clerk stated that he had found the missing gloves on the floor in front of the counter. Judge Merrick charged, that if the defendant placed his hands on Mrs. P.'s shoulder for the purpose of arresting her progress, and with the view of taking her back to the store, he was guilty of an assault. The jury returned a verdi of $20 damages. H. D. Austin for the plaintiff, and T. Willey for the defendant, ne verdict only carries $5 costs.